SJ Securities Sdn Bhd v Clarence Chew Chin Fook

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-502–03 OF 2015
LIM YEE LAN, VARGHESE GEORGE AND IDRUS HARUN JJCA
22 NOVEMBER 2016

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Civil Procedure — Limitation — Claim based on contract — Respondent commenced action against appellant to recover trust monies — Appellant counterclaimed for 'contra-losses' — Whether s 6 of the Limitation Act 1953 applicable — Whether appellant's counterclaim time-barred and unsustainable — Limitation Act 1953 ss 6 & 28

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The respondent, a remisier and a dealer of the appellant's company had commenced an action pursuant to O 18 r 19(1)(b), (c) and (d) of the Rules of Court 2012 to recover from the appellant trust monies amounting to RM2,885,454.27 together with interest accrued since 1997. In response, the appellant filed a counterclaim on 23 September 2014 for a sum of RM39,278,009.03 termed as 'contra-losses' allegedly suffered by the appellant in respect of certain trading accounts of the respondent's clients which arose from a continuing indemnity given by the respondent under the appellant's employment terms ('the agreement'). As against the counterclaim, the respondent submitted the counterclaim was time-barred as the cause of action had accrued in year 1998 when the appellant issued a demand for 'contra-losses' from the respondent. It must be noted that the respondent had ceased employment with the appellant in 2000. The High Court found in favour of the respondent and held that the indemnity flowed from the agreement and therefore remained subject to the limitation provided by s 6 of the Limitation Act 1953 ('the Act'). The learned judge further held that s 28 of the Act could not be invoked against the respondent as the 'part-payment' made in 2014 pursuant to a judgment entered by the appellant against the respondent's clients was effected by the client and not the respondent. The learned judge therefore ruled that the appellant's counterclaim was time-barred and obviously unsustainable. Dissatisfied with the decision, the appellant filed the present appeal. In the instant appeal, the appellant sought to draw a distinction between a normal contract and a 'contract of indemnity' and submitted that the general rule governing limitation in respect of a breach of contract ie six years, may be displaced by a contrary intention evinced by the parties in a particular contract. The appellant also submitted that, with the 'part-payment' made by the client, there had now arisen a fresh cause of action in favour of the appellant.

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Held, dismissing the appeal with costs of RM10,000:

(1) There was no doubt that the right of the appellant to seek indemnity from the respondent was integral to the particular nature of the contractual relationship between the respondent and appellant and as set out within the agreement. Being founded in contract, it was beyond dispute, that s 6 of the Act applied in the present case (see para 25).

(2) The learned judge had rightfully rejected the contention based on the proviso to s 28(5) of the Act. There was express admission by the appellant that the respondent was not the one who effected the payment in 2014 but it was the client. The court therefore found that time had begun to run against the appellant to file the counterclaim either in 1998 or at the latest in 2000 or thereabouts. In the circumstances, whatever cause of action the appellant had against the respondent in respect of the respondent's clients' accounts were no longer actionable in 2014 when the present action was filed by the respondent. The counterclaim was clearly therefore time barred statutorily (see paras 35 & 37).

(3) On the facts, only after the respondent caused a letter of demand to be issued for the trust monies with the appellant on 19 April 2014 did the appellant respond on 17 July 2014 with their demand to be indemnified for the alleged 'contra-losses'. There was no previous demand by the appellant. In the circumstances, the bona fides of the appellant's counterclaim was wholly suspected. In entirety, the appellant's counterclaim was plainly and obviously unsustainable (see paras 38–39).

[Bahasa Malaysia summary

Responden, seorang remisier dan wakil niaga syarikat perayu telah memulakan tindakan berikutan A 18 k 19(1)(b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012 untuk mendapatkan kembali wang amanah perayu bernilai sebanyak RM2,885,454.27 bersama faedah terakru semenjak 1997. Dalam menjawab, perayu memfailkan tuntutan balas pada 23 September 2014 untuk jumlah sebanyak RM39,278,009.03 ditermakan sebagai 'contra-losses' yang didakwa dialami oleh perayu berkaitan akaun niaga tertentu klien responden yang berbangkit daripada idemniti yang berterusan yang diberikan oleh responden di bawah syarat-syarat pekerjaan perayu ('perjanjian'). Terhadap tuntutan balas tersebut, responden berhujah bahawa tuntutan balas dihalang kerana kausa tindakan telah terakru pada tahun 1998 apabila perayu mengeluarkan tuntutan untuk 'contra-losses' daripada responden. Ia mesti diambil kira bahawa responden telah berhenti bekerja dengan perayu pada tahun 2000. Mahkamah Tinggi memihak responden dan memutuskan bahawa indemniti yang ditetapkan daripada perjanjian dan oleh itu kekal tertakluk kepada had masa yang diperuntukkan oleh s 6 Akta Had Masa 1953 ('Akta'). Hakim yang bijaksana selanjutnya memutuskan bahawa s 28 Akta tidak dapat dibangkitkan terhadap responden sebagai 'part-payment' dibuat pada 2014 berikutan penghakiman yang dimasukkan oleh perayu terhadap klien responden dilaksanakan oleh klien dan bukan responden. Hakim yang bijaksana oleh itu

memutuskan bahawa tuntutan balas perayu adalah dihalang had masa dan jelas tidak boleh dikekalkan. Tidak puas hati dengan keputusan, perayu memfailkan rayuan ini. Dalam rayuan ini, perayu memohon untuk menunjukkan perbezaan di antara kontrak biasa dan 'contract of indemnity' dan berhujah bahawa peraturan am mengawal had masa berkaitan pelanggaran kontrak iaitu enam tahun, boleh digantikan oleh niat bertentangan yang ditunjukkan oleh pihak-pihak dalam kontrak tertentu. Perayu juga berhujah bahawa, 'part-payment' dibuat oleh klien, sekarang ini membangkitkan kausa tindakan baru memihak perayu.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Tidak diragui lagi bahawa hak perayu untuk memohon indemniti daripada responden adalah penting kepada sifat tertentu hubungan kontraktual di antara responden dan perayu seperti ditetapkan dalam perjanjian. Memandangkan ditetapkan di dalam kontrak, adalah tidak boleh dipertikaikan, bahawa s 6 Akta diguna pakai dalam kes ini (lihat perenggan 25).

(2) Hakim yang bijaksana telah secara betul menolak hujahan berdasarkan peruntukan kepada s 28(5) Akta. Terdapat pengakuan nyata oleh perayu bahawa responden bukan orang yang melakukan bayaran padaa tahun 2014 tetapi ia adalah klien. Mahkamah oleh itu mendapati bahawa masa mula berjalan terhadap perayu untuk memfailkan tuntutan balas sama ada pada tahun 1998 atau selewat-lewatnya pada tahun 2000 atau dekat-dekat masa itu. Dalam keadaan, apa-apa kausa tindakan perayu terhadap responden berkaitan akaun klien responden tidak lagi boleh didakwa pada tahun 2014 apabila tindakan ini difailkan oleh responden. Tuntutan balas jelas oleh itu secara statutori dihalang masa (lihat perenggan 35 & 37).

(3) Atas fakta, hanya selepas responden menyebabkan surat tuntutan dikeluarkan bagi wang amanah terhadap perayu pada 19 April 2014 barulah perayu respon pada 17 Julai 2014 dengan tuntutan mereka untuk dibayar bagi 'contra-losses' yang didakwa tersebut. Tidak terdapat tuntutan terdahulu oleh perayu. Dalam keadaan, bona fides tuntutan balas perayu disyaki penuh. Secara keseluruhannya, tuntutan balas perayu adalah jelas dan nyata tidak boleh dikekalkan (lihat perenggan 38–39).]

Notes

For a case on claim based on contract, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 6413.

Cases referred to

Malayan Banking Bhd v Basarudin bin Ahmad Khan [2007] 1 MLJ 613; [2007] 1 CLJ 309, FC (refd)

Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141; [1996] 3 CLJ 26, CA (refd)

Legislation referred to

Limitation Act 1953 ss 6, 28, 28(5)

Rules of Court 2012 O 18 r 19(1)(b), (1)(c), (1)(d)

Appeal from: Civil Suit No 22NCVC-387–08 of 2014 (High Court, Kuala Lumpur)

Pramjit Kaur (Mann & Assoc) for the appellant.

Alan Wong (Alex Lim with him) (Zain Megat & Murad) for the respondent.

Varghese George JCA:

INTRODUCTION

[1] This appeal was against the decision of the High Court which had struck out the appellant/defendant's counterclaim after the hearing of an application brought by the respondent/plaintiff under O 18 r 19(1)(b), (c) and (d) of the Rules of Court 2012.

[2] The parties will be referred to herein as they were at the court below.

[3] The plaintiff had initiated this suit (15 August 2014) to recover from the defendant in the main what was alleged to be trust monies amounting to RM2,885,454.27 together will all interest accrued since 1997. The plaintiff's suit included a prayer for accounts as well.

[4] It was averred by the plaintiff that he had been previously in the services of the defendant, a stock broking company, initially as a remisier and subsequently as a dealer, with the terms of his employment set out in an agreement dated 4 December 1994 ('the agreement').

[5] The plaintiff claimed that he ceased employment with the defendant in 2000. He alleged that during his tenure with the defendant there had been deductions made from commissions that were payable to him. These sums were deposited and held by the defendant in trust for the plaintiff. It was also pleaded that these sums held by the defendant was evidence by trust receipts that had been issued from time to time by the defendant to the plaintiff.

[6] The defendant filed a defence and counterclaim (23 September 2014) in respect of that proceedings and in the counterclaim sought to recover from the plaintiff a sum of RM39,278,009.03 (as at 2 July 2014) termed as 'contra-losses' allegedly suffered by the defendant in respect of certain trading accounts of the plaintiff's clients.

[7] The plaintiff applied (16 October 2014) vide encl 6 to strike out the counterclaim. The application was premised on the grounds that the defendant's counterclaim was an abuse of the process of court as the defendant's claim, allegedly for contra-losses, were being brought after statutory limitation had set in against any such recovery.

[8] It was contended by the plaintiff that the defendant's cause of action, if any at all, had arisen on or about 16 February 1998 when the defendant had issued a demand for 'contra-losses' from the plaintiff. This demand had been disputed and rejected by the plaintiff. The defendant had not taken any further proceeding in respect of that alleged 'debt' until the filing of the defendant's counterclaim in the plaintiff's suit, some 16 years later.

HIGH COURT

[9] The defendant's contention at the High Court was that the counterclaim for 'contra-losses' arose from a continuing indemnity given by the plaintiff under his employment terms (the agreement) and the plaintiff's liability was not subject to any defence of 'limitation' as raised by the plaintiff.

[10] It was also stated by the defendant that in any event a judgment was only entered by the defendant on 20 April 2012 against the plaintiff's client and further that client had even made a part payment of RM1.5m on 24 July 2014. Accordingly it was submitted that the counterclaim was brought within time.

[11] The learned judge did not find favour with the defendant's arguments. The court held that the indemnity flowed from the agreement (the contract) and therefore remained subject to the limitation provided by s 6 of the Limitation Act 1953. In the words of the learned judge:

> It cannot be an indemnity which operates in perpetuity or independently of the agreement. It has to be read in the light of the agreement and subject to the restrictions and limitations of the Agreement.

[12] The learned judge also held that s 28 of the Limitation Act 1953, in any case, could not be invoked against the plaintiff as the 'part-payment' was effected by the 'client' and not the plaintiff.

[13] The learned judge ruled that the defendant's counterclaim was time-barred and obviously unsustainable.

THE DEFENDANT'S CONTENTION

[14] The defendant sought to draw a distinction between a normal contract and a 'contract of indemnity' and argued that the general rule governing limitation in respect of a breach of contract (six years) may be displaced by a contrary intention evinced by the parties in a particular contract. Counsel for the defendant relied on the decision of the Court of Appeal in *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141; [1996] 3 CLJ 26 as authority for this proposition. Counsel also cited the Federal Court decision in *Malayan Banking Bhd v Basarudin bin Ahmad Khan* [2007] 1 MLJ 613; [2007] 1 CLJ 309 in support of his contention.

[15] Counsel for the defendant also before us maintained the contention that with the 'part-payment' made by the client, there had now arisen a fresh cause of action, in any event, in favour of the defendant.

OUR DELIBERATION AND DECISION

[16] We have considered *Sia Siew Hong* but did not think that it supported the proposition canvassed by the defendant. That was a case where the respondents had offered their land as a security for a loan obtained by the appellants' company from another ('the lender'). In consideration of the respondents' land being charged in favour of the lender, the appellants personally by the terms of a document titled 'Guarantee' agreed to pay the respondents certain sums should the appellants' company default in this repayment obligations; that 'Guarantee' also stated that it was a '… continuing guarantee …'.

[17] The Court of Appeal (per Gopal Sri Ram JCA, as he then was) held that the label used (*guarantee*) was not material and the document was in the nature of a letter of indemnity upon the document being construed as a whole with specific reference to its objective.

[18] The real issue in that case, in our reading, was what would be the date or event from which time would be calculated to fix the date when limitation would operate in the case of a claim under a letter of indemnity. Was it to be the date of the default in repayment of the loan (by the appellants' company, the borrower) or the date when the charged property was ultimately sold by auction; the latter being the date when the respondents finally disposed of their property.

[19] It was in that context that the court stated as follows: A

> As a general rule, in actions for breach of contract, time under the Limitation Act 1953 begins to run from the date of its breach. *Nasri v Mesah* [1971] 1 MLJ 32 is authority for that proposition. ...
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> But it must always be borne in mind that the question as to when a cause of action arises in relation to the breach of contract is one that depends for its determination upon the construction of a particular contract. Thus, it may be inappropriate to apply the general rule laid down in *Nasri v Mesah* where the breach complained of is a continuing one or where the complaint related to the breach of certain contracts of indemnity.

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[20] It will be appreciated that it was not as if no 'limitation' applied to contracts of indemnity at all. This was clear from the following passage from the same judgment: D

> The second question that requires an answer is this. Since the general rule does not apply, *then, when did time begin to run?* Again, that question, I apprehend, must be answered by having regard to the true nature of the promise made by the appellants to the respondents. Since the promise made by the appellants to the respondents was to indemnify the latter against the loss of the charged property, it is my considered judgment that time began to run against the respondents only from the date on which that loss was suffered and not a moment before.
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> That brings me to the third question. When was the charged property lost to the respondents? The answer is that question must surely be: when it was no longer available to be redeemed in accordance with law.

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[21] The decision of the Federal Court in *Malayan Banking*, similarly in our view, was also of no assistance to the defendant's contention. The appellant — bank had sued the respondent, their former employee, for breach of duty and/or right to be indemnified for all losses occasioned by reason of the employee's misconduct. The High Court held that the claim was in indemnity and as the losses had not been proved, the action was struck; this was despite the trial being agreed to proceed initially to determine liability with the assessment of damages to follow subsequently. The Court of Appeal by majority dismissed the appeal on the grounds that the bank could only pursue their claim on the express indemnity obligation and not any implied terms in the employment contract.

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[22] The Federal Court noted that it was settled law that a contract may give rise to several distinct causes of action and apart from the right to sue relying on the indemnity provision in the employment contract, the appellant had also the right to sue for damages for breach of contract. More significantly, the Federal Court was of the view that the appellant's claim there was for damages

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for breach of contract and not a claim for indemnity and accordingly it was held that liability had been proved and the case was remitted back to High Court for assessment of damages.

[23] It needs to be highlighted that in the *Malayan Banking* the courts did not consider any issue as to the application of statutory limitation, even if it was a claim under a contract of indemnity. *Sia Siew Hong*, contrary to the suggestions of the defendant, clearly held that limitation did apply even in a letter of indemnity context and such time from which time was to run was to be deduced from a construction of the actual terms of the indemnity, particularly with reference to the underlying objective for the giving of that indemnity.

[24] We set out below the relevant clauses in the agreement pursuant to which the defendant was pursuing the counterclaim against the plaintiff:

9. FOR REMISIER'S ACCOUNT

9.1. The Remisier shall be responsible for all debts, interest and costs incurred by his client and until all monies due to the Company are paid, the same shall constitute a debt due from the Remisier to the Company.

9.2. Without prejudice to any rights which the Company may have, the Company reserves the right, if it so desires to initiate legal proceedings against all or any of the Remisier's clients for recovery of any debt due to it and all costs and expenses (on a solicitor and client basis) incurred by the Company in respect of such legal proceedings shall be borne and paid by the Remisier.

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12. INDEMNITY

12.1. The Remisier shall at all times hereafter indemnify and keep the Company indemnified against all actions proceedings liabilities claims demands losses costs (including legal costs on a solicitor and client basis) damages penalties and expenses whatsoever which may be suffered sustained or incurred by the Company arising from or in connection with the appointment of the Remisier hereunder.

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12.3. Without prejudice to the generality of Clause 12.1 above the Remisier shall at all times hereafter indemnify and keep the Company indemnified against all losses costs (including legal costs on a solicitor and client basis) caused by the non-payment of monies or the non-delivery of valid securities and/or transfers by the Remisier's client and in particular losses arising under the following circumstances:

(i) Where a selling client has failed to deliver the securities and transfers within the time allowed by the Company and the Company had to make delivery to a buyer by having to purchase the same in the open market for the same securities and incurred a loss in so doing.

(ii) Where a buying client has failed to pay within the time allowed by the Rules of the Exchange or within such time if any allowed by the Company and the Company had to sell in the open market for the same securities and incurred a loss in so doing.

For the purpose of this Clause, a financial Statement certified by any Director, Manager or Principal Officer of the company as to the amount of the said losses shall be binding and conclusive on the Remisier.

12.4. The Company reserves the right at the Company's absolute discretion to commence legal action against clients of the Remisier in respect of default and/or failure on the part of the clients in performing their contracts with the Company.

[25] There was no doubt that the right of the defendant to seek indemnity from the plaintiff was integral to the particular nature of the contractual relationship between the plaintiff and defendant and as set out within the agreement. Being founded in contract, it was beyond dispute, in our considered view, that s 6 of the Limitation Act 1953 applied in this case.

[26] The issue then for determination boiled down to this — when did time commence to run for purposes of calculating six years before limitation set in and the defendant was precluded statutorily from bringing any recovery action against the plaintiff.

[27] In our assessment given the factual matrix of this case, it could possibly be any one of the following three dates or events, namely:

(a) the date of letter of demand in 1998 (as advanced by the plaintiff);

(b) the date when the plaintiff ceased to be employed by the defendant; or

(c) when judgment was entered by the defendant against the plaintiff's client.

We now consider each one of them.

[28] The defendant's demand in 1998 was by way of a solicitor's letter dated 16 February 1998 which expressly demanded settlement of 'contra losses' in respect of two clients' accounts, namely, *2SBO019* and *3FO123*, amounting to a total of RM8,575,408.66 as at 11 February 1998. The plaintiff had by a letter of 11 March 1998 disputed this demand and this was further followed up with a letter from the plaintiff's solicitors of 13 April 1998. The defendant did not respond to these latter letters denying the defendant's claim and neither did the

defendant initiate any proceedings to recover the alleged debt.

[29] It is also pertinent to point out that the defendant in the defence and counterclaim filed, firstly, refers to the very same two clients' account and secondly, alludes to a principal sum of RM7,358,871.16 (see paras 5.5 and prayers (a) and (b) of the counterclaim). It was obvious to us that the total claim of RM39,278,009.03 (stated to be as at 2 July 2014) sought to be recovered by way of the counterclaim from the plaintiff comprised in the bulk interest sum that had accrued on the principal sum over the years since 1998 or thereabouts when the 'contra-losses' was only in the region of RM7m–RM8m then.

[30] In other words, what could be reasonably inferred was that 'contra-losses' for which the plaintiff could have been held liable had crystallised as a debt due way back in 1998 or thereabouts. There was no averment made in the affidavits of the defendant nor any statement of accounts produced by the defendant to show that this was not the situation obtaining in this case.

[31] Another possible point of time from which time could be calculated to bring any action to recover such 'contra-losses' from the plaintiff would be the date when the plaintiff ceased employment with the defendant. As noted earlier the liability of the plaintiff to keep the defendant indemnified was an incidental term of the plaintiff's employment (described as an 'agent' of the defendant in the agreement) with the defendant.

[32] In that respect, cl 11 of the agreement was relevant and it was as follows:

> 11. TERMINATION
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> Either party hereto may terminate this Agreement at any time hereafter by giving to the other party one (1) month's notice in writing. Provided always that the *Remisier shall be responsible* for the clearing of all outstanding contracts and *be liable for any debt or liability of whatsoever nature* which are or may be incurred by the Remisier *and/or are or may be due and owing to the company*.

In our reading of that clause there was clearly implied a cut-off date for liabilities to be fixed as between the plaintiff and defendant in respect of all monies as may be due from the plaintiff.

[33] At para 6 of the affidavit in support the plaintiff has positively affirmed that he ceased to be in the employ of the defendant in or about 2000. The defendant has denied this claim but has failed to make available any material that would show the plaintiff's last date of employment with them, save for the reference in the statement of defence and counterclaim as to the plaintiff being under 'suspension' (para 5.2).

[34] The defendant's contention was that time only began to run against the defendant in bringing an action to recover the 'contra-losses' from the plaintiff *either* from 20 April 2012 when judgment was entered by the defendant against the client of the plaintiff *or* from 24 July 2014 when a sum of RM1.5m was received from that client as part payment towards settlement of judgment sum. That payment, it must be highlighted, was by the client against whom the judgment was entered. It was not in dispute that the plaintiff was not included as a party to the defendant's suit against the client.

[35] Resort to that line of contention to counter the plaintiff's position, namely, that the defendant's counterclaim was time-barred, impliedly meant that the defendant conceded that relevant period of limitation had set in, in so far as the defendant's counterclaim was concerned, but that such debt has been acknowledged and revived by the subsequent payment received to account in 2014. The learned judge had, and rightfully in our view, rejected that contention based on the proviso to s 28(5) of the Limitation Act 1953. There was express admission by the defendant that the plaintiff was not the one who effected the payment in 2014 (see 4.2 of the *afidavit jawapan* for the defendant) but it was the client (the judgment debtor).

[36] Section 28(5) of the Limitation Act 1953 is set below:

> (5) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect thereof:
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> *Provided that a payment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any person other than the person making the payment* and his successors, and shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the payment.

[37] In our considered unanimous view, time had begun to run against the defendant to file an action to recover whatever 'contra-losses' that allegedly had to be indemnified by the plaintiff, either in 1998 or at the latest in 2000 or thereabouts, as discussed and elaborated above. In the circumstances whatever cause of action the defendant had against the plaintiff in respect of the two clients' accounts were no longer actionable in 2014 when this action was filed by the plaintiff. The counterclaim of the defendant was clearly therefore time-barred statutorily.

[38] It behoves attention too that only after the plaintiff caused a letter of demand to be issued for the trust monies with the defendant on 19 June 2014 (para 10 of statement of claim) did the defendant respond on 17 July 2014 (para 14 defence and counterclaim) with their demand through solicitor's to be indemnified for the alleged 'contra losses' (para 14 of the defence and

counterclaim). There was no previous demands by the defendant. By all indications the defendant was not only totally indifferent in pursuing their claim for 'contra losses' against the plaintiff, if at all it was genuine, but appeared to also have accepted that they no longer had any such recourse available at all on that score until the plaintiff demanded for the trust monies and subsequently filed their action. The bona fides of the defendant's counterclaim was in the circumstances wholly suspect in any event.

[39] The defendant's counterclaim was plainly and obviously unsustainable. The learned judge did not err in striking out the counterclaim. We found no reason to interfere with that decision and accordingly dismissed the appeal with costs in the sum of RM10,000 awarded to the plaintiff (respondent).

Appeal dismissed with costs of RM10,000.

Reported by Dzulqarnain Ab Fatar